

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HUMBLE SURGICAL HOSPITAL, LLC,)
)
Plaintiff,)
) NO. H-14-CV-3177
v.) January 8, 2015
)
AETNA LIFE INSURANCE COMPANY,)
et al.,)
)
Defendants.

INITIAL CONFERENCE
BEFORE THE HONORABLE LYNN N. HUGHES

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24 Proceedings reported by mechanical stenography and produced
25 by computer-aided transcription.

1 THE COURT: Thank you. Good morning.

2 MR. SHELBY: Good morning, Judge.

3 MS. PALERMO: Good morning, Judge.

4 THE COURT: Mr. O'Neill, it was not clear to me
09:36 5 from the complaint. Does Humble Surgical intend by this
6 complaint to sue the sponsor and the plan?

7 MR. O'NEILL: I'm sorry, Your Honor. I didn't hear
8 you.

9 THE COURT: Does Humble Surgical, by this
09:36 10 complaint, intend to sue the sponsors and the plans?

11 MR. O'NEILL: Your Honor, it's our understanding
12 that -- Yes. The answer to your question is "Correct".

13 THE COURT: So, there are 48 parties instead of 24.

14 MR. O'NEILL: I think there are 22 or 23, Your
09:37 15 Honor.

16 THE COURT: And what is the nature of the claim
17 that Humble has against the sponsor?

18 MR. O'NEILL: Your Honor, it's my understanding
19 that -- First of all, all of the claims that are brought in
09:37 20 this lawsuit relate to what the Hospital views as a virtual
21 nonpayment of claims since October 25th -- actually, going
22 back a little bit further than that -- October the 25th of
23 2013. It is my --

24 THE COURT: I am painfully aware of the foreground
09:37 25 in this case.

1 MR. O'NEILL: It's my --

2 (Simultaneous dialogue)

3 THE COURT: -- 2013 nothing but ERISA cases and way
4 too many of them involve Mr. Shely.

09:38 5 MR. O'NEILL: Your Honor, let me just stop and say
6 I apologize. It's me. It's not you. I am hard of hearing.
7 But something about the acoustics in here; I am really
8 having a hard time hearing you. I apologize.

9 THE COURT: There is a background noise, which I
09:38 10 don't know what it is or I'd tell somebody to stop it.

11 MR. O'NEILL: Well, I drove a concrete truck when I
12 was in college and that kind of ruined my hearing. So, I
13 apologize.

14 THE COURT: Well, that is an honorable way to lose
09:38 15 your hearing. Some grown people probably can't hear from
16 disco music and some of the other ones. I don't know what
17 you call that stuff.

18 MR. O'NEILL: I don't think that would help.

19 (Off-the-record commentary)

09:38 20 THE COURT: What is the nature of the claim that
21 Humble has against the sponsors?

22 MR. O'NEILL: Well, these are -- As I am sure Your
23 Honor knows, there are fully insured plans and there are
24 self-insured plans. We have self-insured --

09:39 25 THE COURT: It doesn't matter. The question is --

1 How the sponsor chooses to sponsor it, whether they use a
2 financial intermediary or fund it themselves, is irrelevant.

3 MR. O'NEILL: Your Honor, it's my understanding
4 that there is joint and several liability of both Aetna and
09:40 5 the plans and the sponsors.

6 THE COURT: No.

7 MR. O'NEILL: Mr. Cathey is more familiar with that
8 than I am.

9 THE COURT: A claim for plan benefits -- that's
09:40 10 what we have here, right? --

11 MR. O'NEILL: Yes.

12 THE COURT: -- is only directed under the
13 statute -- which last year was 40 years old(?) -- is
14 addressed to the plan, not to the sponsor, not to the
09:40 15 participant, not to the beneficiary. To the plan.

16 Are you going to sue the participant if it is
17 a partially participant-funded plan?

18 MR. O'NEILL: Your Honor, I'm not going -- I hope
19 you know me well enough to know I'm not going to stand here
09:41 20 and pretend to know something I don't know. Mr. Humphrey or
21 Mr. Cathey is more -- I think, can answer your question
22 better than I can.

23 THE COURT: All right.

24 MR. CATHEY: Yes, Your Honor.

09:41 25 MR. O'NEILL: Brian, do you want to come up.

1 Your Honor, with the Court's permission, may
2 he approach?

3 THE COURT: Sure.

4 MR. CATHEY: Your Honor, we haven't had a chance to
09:41 5 reveal the plan --

6 THE COURT: Wait a minute. Move the microphone up
7 a little bit.

8 MR. CATHEY: We haven't had a chance to -- we
9 haven't obtained copies of all the plans, but, as we
09:41 10 understand it --

11 THE COURT: I'm sorry. I am asking you a
12 fundamental statutory question.

13 MR. CATHEY: Yes, sir. Under the binding Fifth
14 Circuit precedent --

09:41 15 THE COURT: I am asking you a statutory question,
16 not a footnote question, counsel.

17 MR. CATHEY: Okay.

18 THE COURT: And precedent is not binding unless
19 it's the same parties on the same facts.

09:41 20 You were on the *Law Review*, weren't you?

21 MR. CATHEY: I was on a journal.

22 THE COURT: And that's a distinction that people
23 who are on the *Review* love to make, and it's like saying
24 that I was the first clown and not the second clown in the
09:42 25 circus.

1 Counsel, the statute has its own words.

2 MR. CATHEY: Yes, sir. And it does -- You are
3 correct, Your Honor, that it does make the plan --

4 THE COURT: I have been practicing law, probably,
09:42 5 as Mr. O'Neill, longer that there's been ERISA. It's one of
6 those things that disrupted a fairly decent practice by
7 making me learn a whole new field of law.

8 It says the plan is the obligor and claims for
9 benefits are addressed to the plan. That will be the ruling
09:42 10 of this court.

11 The statute has not been amended. Whether you
12 think it's a conspiracy to deny the claim or a tort to deny
13 the claim or six varieties of breach of contract to deny the
14 claim, the obligor is the plan. Frequently, the financial
09:43 15 intermediary, since they're paid to administer it, do the
16 court work. You wouldn't want the plan to have to pay for
17 two sets of lawyers.

18 But there is no claim against the sponsor
19 because the plan didn't pay a benefit.

09:43 20 MR. CATHEY: The reason that the plan sponsors are
21 here is --

22 THE COURT: -- is because you sued them.

23 MR. CATHEY: Well, correct.

24 THE COURT: They'd rather be elsewhere than --

09:43 25 MR. CATHEY: The reason they were named in this

1 sense is because most of them, at least without having seen
2 the plans, they would also be the named plan administrator
3 of the plans; and, so --

4 THE COURT: Why don't you sue the plan? Just
09:44 5 figure out who it is.

6 Why don't you sue the lawyer who drafted the
7 plan to get him to tell you what -- You don't make parties
8 out of sources of information.

9 MR. CATHEY: ERISA does not -- as we understand it,
09:44 10 ERISA does not contain an express limitation on the parties
11 that may be named and the Fifth Circuit has said you may see
12 the plan --

13 THE COURT: Counsel --

14 MR. CATHEY: Yes, sir.

09:44 15 THE COURT: -- when you get to the court of appeals
16 of any circuit you choose, you may use that to persuade
17 them.

18 MR. CATHEY: Okay.

19 THE COURT: In this case you have sued -- you just
09:44 20 told me you sued people to get discovery.

21 MR. CATHEY: No, Your Honor. We sued them upon the
22 best information we had.

23 THE COURT: Counsel, you just said, well, you
24 didn't have it; so, you want to sue them and find out
09:45 25 whether they're the plan administrator.

1 MR. CATHEY: No. That was our understanding --

2 THE COURT: That's what you said.

3 MR. CATHEY: Well, I apologize if I was unclear.

4 We are suing on the understanding --

09:45 5 THE COURT: Unclear? You were just wrong.

6 Now, counsel, tell me the cause of action --

7 that is, the facts -- that would make American Express

8 Company liable to Humble Surgical Hospital for Fran

9 Johnson's appendectomy.

09:45 10 MR. CATHEY: To the extent they are the plan

11 administer or exercise actual control over the

12 administration --

13 THE COURT: They are not individually liable, are

14 they?

09:45 15 MR. CATHEY: To the extent they exercise control

16 over the plan --

17 THE COURT: I heard that the first time.

18 MR. CATHEY: Okay.

19 THE COURT: You sue the plan. You don't sue the

09:46 20 employees, their assistants, the contract people they

21 arrange to make the plan work. It's what the statute says.

22 The plan is a juridical entity, and it's been that way for

23 40 years.

24 MR. CATHEY: Yes, sir.

09:46 25 THE COURT: It's in the statute. Courts of appeals

1 have said, sure, you can sue the financial intermediary if
2 they want to be sued.

3 I actually had a case where the insurance
4 company showed up and said, 'Sure. We'll just appear for
09:46 5 the plan and everything.' And then when I ruled against
6 them they appealed on the grounds they weren't the right
7 party to the court of appeals. I, unfortunately, did not
8 memorialize that appearance in the record. It was clear,
9 but....

09:47 10 You have no claim against American Express. I
11 picked it because it's, alphabetically, at the top of the
12 docket list anyway.

13 Anything that was done wrong or not done was
14 done by the plan. You know nothing that the sponsor did
09:47 15 wrong. Even if it were a sponsor -- and I have had these
16 cases where a sponsor either just quits paying or goes broke
17 and can't pay and, so, there's a deficiency in the plan with
18 no funds. That's a failed plan. That's not a claim against
19 an assignee. It has to be put in the plan before it's
09:47 20 available for Humble Surgical.

21 You can't tell me what American Express did
22 wrong, can you? American Express are not sponsors,
23 generally.

24 MR. CATHEY: We're not suing them, Your Honor, to
09:48 25 make the distinction, as the sponsor per se. We're suing

1 them to the extent that they're the named plan administrator
2 under ERISA. And so --

3 THE COURT: You don't have a claim against the
4 administrator. You have a claim against the plan.

09:48 5 MR. CATHEY: But, Your Honor, the complaint --

6 THE COURT: You have got a fundamental
7 misunderstanding of who parties are. The parties are the
8 obligor.

9 MR. CATHEY: If they exercise their discretion.

09:48 10 THE COURT: I know about that.

11 MR. CATHEY: Okay.

12 THE COURT: Your claim in this case is no
13 discretion was exercised, isn't it?

14 MR. CATHEY: Excuse me?

09:48 15 THE COURT: Your claim is that no discretion was
16 exercised.

17 MR. CATHEY: Improperly exercised. Correct.

18 THE COURT: What?

19 (Simultaneous dialogue)

09:49 20 THE COURT: What did you say?

21 MR. CATHEY: I said they abused their discretion,
22 Your Honor.

23 THE COURT: They didn't use their discretion is the
24 essence of the 65-page complaint?

09:49 25 MR. CATHEY: Yes.

1 THE COURT: It's still a claim for benefits. You
2 get the benefit if they abuse their discretion by appealing
3 the denial, don't you?

4 And it says in this complaint that you have
09:49 5 exhausted your remedies because they have been unreasonable
6 or something about a quarter of the way through. You
7 exhaust a claim for an individual, a person, not for a class
8 of financial injury to a second-level medical service
9 company.

09:50 10 In which instance did American Express abuse
11 its discretion?

12 MR. CATHEY: With respect to the patient identified
13 in the complaint. We have attempted to break down on a
14 claim-by-claim basis against American Express and identified
09:50 15 the patient without identifying, you know, specific
16 information about them.

17 THE COURT: Which paragraph identifies?

18 MR. CATHEY: It would start on Page 16,
19 paragraph 49, to be specific, Your Honor.

09:51 20 THE COURT: What does it matter that the plan is
21 self-funded?

22 MR. CATHEY: In this -- I don't think it
23 necessarily makes a distinction in this case, but it --

24 THE COURT: Then, don't put it in the complaint.

09:51 25 Tell me about No. 1. What procedure did he

1 have done?

2 MR. CATHEY: Your Honor, we did not bring all of
3 the EOBs and information with us today, but we are prepared
4 to exchange that information as necessary.

09:52 5 THE COURT: And have you had an independent medical
6 evaluation of the services provided and the claims
7 submitted?

8 MR. CATHEY: My understanding is that we have not,
9 and that was because the claim was not denied for lack of
09:52 10 medical necessity. I do not think that it is disputed, Your
11 Honor.

12 THE COURT: Why was it denied?

13 MR. CATHEY: The only thing they have told us is
14 three words, Your Honor. "Improper claim submission".

09:52 15 THE COURT: Okay. And have you not seen the letter
16 that Aetna sent?

17 MR. CATHEY: To whom, Your Honor?

18 THE COURT: To the plans, I guess it was. Well, at
19 least to Humble Surgical.

09:52 20 MR. SHELLEY: Yes, Judge. A letter was sent to
21 Humble and then, also, a web site was put up for
22 participants and beneficiaries to know the basis for denial
23 of the claims.

24 THE COURT: So, Mr. Cathey, have you seen the
09:53 25 letter to your client?

1 MR. CATHEY: To the extent -- I believe so.

2 THE COURT: You believe so? That's the essence of
3 the problem here.

4 Aetna announced that it was not doing business
09:53 5 with this particular out-of-network provider. Right?

6 MR. CATHEY: Correct.

7 THE COURT: And, so, how can Humble have relied on
8 any coverage comments when it was directly and individually,
9 personally notified of its disqualification? You have about
09:53 10 six versions of detrimental reliance, applied contract,
11 contract in fact, all of which can't vary the terms of the
12 plan, but I will ignore that for a minute. Tell me where
13 your reliance is.

14 MR. CATHEY: Your Honor, it's in reliance on their
09:54 15 express statements that coverage would be provided for the
16 specific patient for a specific procedure.

17 THE COURT: The statement was that is a covered
18 thing. You say it was Humble Surgical asking?

19 MR. CATHEY: Yes, sir, as outlined in the
09:54 20 complaint, Your Honor. We provided that information, the
21 specific patient and the procedure to be provided.

22 THE COURT: After they had already told you they
23 wouldn't do it? That's a game that's just too cute.

24 All right. So, go back and tell me what
09:54 25 American Express did wrong with No. 1.

1 MR. CATHEY: Your Honor, upon information and
2 belief, as we state in the complaint --

3 THE COURT: Quit saying that. You clearly have no
4 direct knowledge of anything in this complaint, do you? Do
09:55 5 you?

6 MR. CATHEY: I -- I -- I have direct knowledge, but
7 my knowledge is limited, Your Honor.

8 THE COURT: What direct knowledge do you have?

9 MR. CATHEY: The information that our client has
09:55 10 been provided by Aetna. We have attempted to review all of
11 that information prior to filing this lawsuit.

12 THE COURT: That's secondary knowledge. You're
13 reading other people's mail and making conclusions.

14 What's the basis for your information and
09:55 15 belief -- since that means you don't know. Right?

16 MR. CATHEY: With certainties, Your Honor.

17 THE COURT: You don't know. "Knowing" means you
18 have some precise, reliable data that is real.

19 Just tell me what you feel about American
09:56 20 Express in Patient No. 1.

21 MR. CATHEY: Based upon industry custom and
22 practice --

23 THE COURT: (Throwing hands up). So, rumors about
24 what is standard practice.

09:56 25 Go ahead.

1 MR. CATHEY: Well, Your Honor, we have attempted to
2 request the plan and they --

3 THE COURT: I am sorry. Your ignorance is not a
4 justification for suing American Express. Is it?

09:56 5 MR. CATHEY: In this case we feel that -- I mean,
6 to the extent --

7 THE COURT: You feel, yes. So, the answer is:
8 You're just assuming because industry practice....

9 Now, tell me what the industry practice is
09:56 10 that American Express followed in this instance.

11 MR. CATHEY: ERISA provides -- the statute provides
12 that a no-named plan administrator -- if the plan did not
13 name a plan administrator, the plan is administered by
14 default, the employer and the sponsor.

09:57 15 THE COURT: Whom you have sued as administrator.

16 MR. CATHEY: Who we have sued as administrator,
17 correct.

18 THE COURT: Well, that's what one would do. But
19 you don't know that there's no plan administrator, do you?

09:57 20 MR. CATHEY: As I have stated, we don't know that
21 with a hundred percent certainty.

22 THE COURT: How certain are you? 72.3? 13? No.
23 You're assuming that -- and it's probably statistically
24 true, because most plans are not the size of these. In most
09:57 25 normal, small companies the sponsor is the administrator, as

1 Mildred in the front office does all that sort of stuff for
2 you.

3 So, you're just assuming from that. It's not
4 common for American Express to hire professional contractors
09:58 5 to handle claims like this?

6 MR. CATHEY: There is a distinction, I think, Your
7 Honor, between necessarily them hiring a third-party
8 administrator to assist them and them still being the named
9 plan administrator, Your Honor.

09:58 10 THE COURT: There is. That wasn't my question.

11 MR. CATHEY: Yes, Your Honor.

12 THE COURT: My question was: Don't they hire
13 people to do that sort of thing for them? Sometimes they're
14 named the plan administrator, aren't they?

09:58 15 MR. CATHEY: Sometimes.

16 THE COURT: Sometimes it's the executive
17 vice-president and intergalactic chairman for human
18 resources, or somebody, who is named as the plan
19 administrator. But you just don't know.

09:58 20 So, you could sue the plan, couldn't you?

21 MR. CATHEY: Yes.

22 THE COURT: And they have addresses.

23 MR. CATHEY: Yes.

24 THE COURT: And I take it you have no contact with
09:59 25 No. 1, your American Express.

1 MR. CATHEY: I personally have not, Your Honor.

2 THE COURT: Well, other than the medical work by
3 Humble, neither has your client, about asking him, saying,
4 'By the way, who is the sponsor on your plan?'

09:59 5 MR. CATHEY: There may have been some
6 communications that would be documented in their contact
7 production.

8 THE COURT: I, actually, don't recommend that,
9 because part of the object of ERISA is to leave the poor
10:00 10 patient alone.

11 And what was done on No. 1?

12 MR. CATHEY: As I am looking at this, Your Honor,
13 in paragraph 50 we identify it as a sinus surgery.

14 THE COURT: In 50? Oh. There it is.

10:01 15 Is there a reason no summons have been
16 requested?

17 MR. CATHEY: Mr. Humphrey can more directly address
18 the status of that.

19 Do you feel more comfortable --

10:01 20 MR. HUMPHREY: With the Court's permission.

21 THE COURT: Sure. I will talk to whoever.

22 MR. HUMPHREY: No specific reason other than that's
23 normally our procedure, to serve them with a waiver of
24 notice of -- a waiver of summons and ask them to respond and
10:01 25 waive the service of the summons.

1 THE COURT: Is that done?

2 MR. HUMPHREY: Your Honor, we have served all the
3 Defendants with a notice of the complaint, the complaint,
4 the request for the waiver of service. It's my
10:02 5 understanding, as of yesterday, only one of the 24
6 defendants had actually returned the waiver of service, of
7 the summons. So, it's our intention to go ahead and get 23
8 summonses and serve those in conformance with the rule.

9 THE COURT: How much time has elapsed?

10:02 10 MR. HUMPHREY: I think it's been about 60 days
11 since the complaint was filed, Your Honor.

12 THE COURT: And nobody has called and said, 'Hang
13 on. I am going to...'?

14 MR. HUMPHREY: Yes, Your Honor. One other party
10:02 15 has called. American Express in-house counsel requested
16 additional time to respond, Your Honor, which we granted.

17 THE COURT: Is HCA the people who sent back the
18 waiver --

19 MR. HUMPHREY: That's my understanding, Your Honor.

10:02 20 THE COURT: -- and why they're here?

21 And I'm sorry I had to reset this. You
22 probably thought it was for a holiday party, but, actually,
23 I went into the hospital, and that's against my general
24 principle.

10:03 25 (Off-the-record commentary)

1 THE COURT: So, I'm sorry about the reset.

2 I heard that somebody from Exxon showed up.

3 MR. DAVIS: Yes, Your Honor.

4 THE COURT: Are you the other --

10:04 5 MR. DAVIS: Exxon and Entergy. So, I was --
6 Mr. Shely, I think, is going to represent a lot of the other
7 defendants and has a conflict with Exxon and Entergy. So,
8 assuming we --

9 THE COURT: Did you not get the -- I was told
10:04 10 somebody from Exxon showed up at the original date. That's
11 what brought the whole thing up.

12 MR. DAVIS: Oh. Okay. No. I am outside counsel
13 for Exxon.

14 THE COURT: I apologize to whoever showed up,
10:04 15 whoever it may have been. Apparently, they got tired and
16 didn't come back.

17 Well, except for those, Mr. Humphrey, if
18 Humble is serious, issue the summons and get them served.

19 MR. HUMPHREY: We'll just see, Your Honor.

10:05 20 THE COURT: Obviously, the number of parties is
21 slightly distracted, but they all turn on an event and its
22 predicate, which are Aetna's rejection of business tendered
23 by Humble for reasons that involved a very careful exercise
24 of discretion after an extensive experience with Humble
10:05 25 Surgical. This is the consequence of that decision. And,

1 so, it seems to me a fairly simple case. Just some legal
2 theories to apply to the transaction.

3 Mr. Shely, is there anything you feel
4 compelled to add?

10:06 5 MR. SHELBY: A couple of things, Your Honor.

6 Happy New Year.

7 THE COURT: Happy New Year. Well, did you go scuba
8 diving?

9 MR. SHELBY: No, Judge. That's usually a summer
10:06 10 thing for me.

11 THE COURT: You're smarter than I thought.

12 MR. SHELBY: Yes, Judge. But summer is coming.

13 Judge, of course, as you indicated, you're
14 very familiar with the history of this case.

10:06 15 THE COURT: Painfully.

16 MR. SHELBY: "Painfully" was your word.

17 THE COURT: I am.

18 MR. SHELBY: And I think it's essential that you
19 look at this latest suit by Humble through the prism of
10:07 20 their past conduct before you. I will hit just a few
21 highlights, Judge, or we'd be here all day.

22 But this is a situation where Humble, not
23 liking the Court's rulings and changing counsel several
24 times last Christmas -- not the one we just had -- went on
10:07 25 their holiday forum shopping spree and they filed a suit in

1 Connecticut trying to challenge your ruling regarding the
2 notice that we just talked about, that 'Here's why Humble's
3 claims won't be paid, because of its' -- to be blunt, 'its
4 not-honest billing.'

10:07 5 So, they ran to Connecticut and then they ran
6 to New Jersey. And it took me a little while, but we
7 lassoed the Connecticut case and it's back in front of you,
8 with apologies, Your Honor.

9 THE COURT: Thank you.

10:07 10 MR. SHELY: And the New Jersey one is still out
11 there. And then Humble did what it's done.

12 I know Mr. O'Neill has a very fine reputation.
13 This isn't directed to him in any way. But, by my count,
14 this is the fifth set of lawyers for Humble in two years
10:08 15 here.

16 And as I told you almost a year ago -- I went
17 back and looked it up. We had a hearing on January 3rd, a
18 year ago, and at that time you indicated, of course, that
19 you had the pending motions for judgment on the accounting
10:08 20 phase of this case, the issue that you determined, and we
21 followed your determination, that we should decide that
22 first.

23 THE COURT: When we first got together I had
24 already read the original, original, original complaint by
10:08 25 Aetna, but it had a super-fluidity of legal theories, in my

1 humble judgment. And, so, I said we're going to worry about
2 the accounting and we'll worry about cosmic disharmony and
3 RICO and all that stuff later. Apparently, it's not later
4 yet.

10:09 5 MR. SHELLEY: And that's really the point, Judge.
6 It's not later yet. And I told you a year ago, Judge, when
7 we had that hearing, that the reason Humble is doing what
8 it's done -- which you have characterized in this case their
9 actions as uniquely recalcitrant. They, as you know, didn't
10:09 10 produce all the documents that you ordered to be produced.
11 Then they told the Fifth Circuit, on the record, that they
12 had. Then they came down and changed counsel and said,
13 'Well, there actually is more stuff.' You ordered them to
14 produce it. You told them it was the last chance. They
10:09 15 still didn't do it.

16 And we had a hearing in October of 2013. And
17 you might recall we put on the lead doctor for Humble on the
18 stand and we determined, a few months before that, that they
19 had these use agreements. Well, they're fee-splitting with
10:10 20 the owners of Humble, who are the treating physicians, and
21 the referring physicians. And that's not okay. They can't
22 split their facility fee with them. That's what we found
23 out happened.

24 We went in. We had the next day, or the day
10:10 25 after, a deposition in your jury room and we also -- At the

1 end of that, you ordered them to produce additional
2 documents.

3 And, so, their response on all of that was to
4 run and try to challenge your handling of this case in other
10:10 5 courts. We came in and said, 'Judge, what are we doing?'
6 So, we have kind of had it on a hold, on pause, while we get
7 the Connecticut case back.

8 We saw that the order found that their libel
9 claim was completely preempted. I brought that case, Judge,
10:10 10 but there's some work already done on it if you choose to
11 follow it.

12 And, so, now we're back. And you have
13 indicated that, you know, the Court -- that an order will be
14 coming on what is Phase I, the accounting.

10:11 15 So, what Aetna is requesting that you do here,
16 Judge, with respect to this latest suit filed by Humble, is
17 to stay it and no one is going to be harmed.

18 What they're trying to do is say they need
19 discovery. You will recall we have produced the plan
10:11 20 documents you ordered us to produce. We have produced -- I
21 think it's 45 plans for about 16 sponsors. They have those.
22 They have their claims data. The motions are pending on the
23 issue of the accounting, and until that issue is resolved
24 the expense and distraction of having to respond to this
10:11 25 latest suit suing 23 plans or plan sponsors or whatever they

1 meant to do should not be allowed to, essentially,
2 end-around your prior order.

3 Now, you will recall -- and this was
4 Mr. Melon filed a motion for leave to file counterclaims in
10:12 5 the original suit.

6 THE COURT: I'm at 24 parties.

7 MR. SHELY: Aetna is the 24th, I think, Judge.

8 THE COURT: 23 plans.

9 MR. SHELY: 23 plans.

10:12 10 THE COURT: So, that's 56. 23 sponsor, 23 plans,
11 and then --

12 MR. SHELY: That would be 47. And I'm sure --

13 THE COURT: Just seeing if you're paying attention
14 to --

10:12 15 MR. SHELY: -- when this suit was -- math was not
16 my strong suit, Judge -- but, when this suit was filed in
17 December, Humble did their best with what they had to work
18 with to explain to you why this was a different case; and
19 you, of course, issued an order saying this case would be
10:12 20 before you, of course, obviously, related to what we have
21 been dealing with for over two years now. And you told, at
22 least the last set of lawyers and maybe the set of layers
23 before, that 'We're not starting over.' 'Welcome, but we're
24 not starting over.'

10:13 25 And what Humble is trying to do here is start

1 over. They want to talk about other things and try to have
2 discovery and -- This is a well-worn page from the playbook
3 for providers. When they get caught doing what they're
4 doing, they go sue --

10:13 5 THE COURT: For reference, you might say it's
6 Groundhog Day.

7 MR. SHELY: Yes, Judge. We have been over this.
8 They are attempting to cause disruption for --

9 THE COURT: For the older people, there's a movie
10:13 10 called that, not just a groundhog.

11 MR. SHELY: They're attempting to cause disruption
12 in Aetna' business by suing plans and plan sponsors or
13 whatever it is they're intending to do.

14 And with respect to the issue of summons, it
10:13 15 appears highly likely that if this case goes forward -- and,
16 again, we're asking that it be stayed for now -- then my
17 firm would represent a number of the defendants, whether
18 it's 23 or 47, and Mr. Davis is going to represent most of
19 the others. Mr. Constantine is in for HCA currently.

10:14 20 But that really kind of makes our point,
21 doesn't it, Judge? Why would we have to have all these
22 parties spending all this money to come down here to have
23 hearings when what we need to do, as you previously
24 indicated, is get the accounting issue handled, and those
10:14 25 motions for judgment and cross-motions are pending?

1 And, really, Humble -- as I said a year ago,
2 Judge, Humble doesn't think you can do anything to them.
3 Humble's principals just figure if they keep changing
4 lawyers and file enough suits then somehow they're going to
10:14 5 escape this. They have leave to file a counterclaim on file
6 in our original suit.

7 You, under Rule 1, in your discretion, have
8 determined that, before we decide counterclaims and whether
9 we're going to allow those, we are going to handle the
10:15 10 accounting issue. This latest suit is just their attempt to
11 force that issue. It's not the order of proceedings that
12 you have laid out, it's not how the parties have operated,
13 and there is really no sense in starting there today.

14 What we should do, respectfully, or what Aetna
10:15 15 is asking you to do is stay this case. Aetna is here in
16 both of the other cases. Humble is in all of them. We can
17 go back to where we started, which was the first case and
18 the accounting in Phase 1. We're not going to do a do-over.
19 The Court can rule on those issues pending before it and
10:15 20 then we can see where we are and what we need to do, if
21 anything, thereafter.

22 So, that's the relief that we're asking for
23 today to avoid the expense and costs that would be
24 associated with responding to Humble's latest suit and,
10:15 25 again, that relief is especially appropriate given Humble's

1 history before you in this court -- its failure to comply
2 with court orders, its failure to produce the documents you
3 order them to produce, and then, when they didn't like that,
4 they ran around the country trying to escape.

10:16 5 We're all back now. It's a fresh year. And
6 what we respectfully ask is that you stay this suit, meaning
7 the one we're here on today, and then, when the Humble
8 accounting is taken care of in the first suit, then we can
9 get back together and decide what else, if anything, we need
10:16 10 to do.

11 THE COURT: Are there documents about this?

12 MR. SHELY: I'm sorry, Judge?

13 THE COURT: There's a dolly with four boxes of
14 documents.

10:16 15 MR. SHELY: That is probably -- Judge, I am
16 guessing. That's probably the pleadings from the case that
17 we have been on today as opposed to the third one. We
18 brought that over.

19 MS. PALERMO: That's not ours.

10:17 20 MR. SHELY: Oh. That's not ours. I know we were
21 bringing a couple boxes, but I didn't think it was that
22 many.

23 THE COURT: It arrived yesterday afternoon. I
24 didn't see who delivered it.

10:17 25 (Off-the-record discussion)

1 THE COURT: All right. Anything else?

2 MR. SHELLEY: Nothing else, unless you have any
3 questions, Your Honor.

4 THE COURT: No, sir.

10:17 5 And, Mr. Davis -- I'm sorry -- do you have
6 anything now to add?

7 MR. DAVIS: No, Your Honor. I think we can work
8 out the summons. We have got a misjoinder of some of the
9 parties in terms of who the plans and plan sponsors are, but
10:17 10 we can work that out.

11 THE COURT: Mr. Cathey, did you tell me that your
12 client didn't have the plans?

13 MR. CATHEY: I believe that's correct, Your Honor.

14 THE COURT: I wouldn't put too much faith in that
10:18 15 belief. Somebody got them for Humble in this litigation.

16 MR. HUMPHREY: Yes, Your Honor. I think what
17 Mr. Cathey was referring to is the specific plans at issue
18 for the claims at issue in the new lawsuit. We haven't been
19 produced those plans. But you're correct. In the existing
10:18 20 lawsuit Aetna has produced copies of plan documents related
21 to some of the plans at issue in the lawsuit.

22 THE COURT: Some of them are bound to overlap.

23 MR. HUMPHREY: You're correct, Your Honor. There
24 probably is overlap. I don't think we have done a complete
10:18 25 inventory of that.

1 THE COURT: So, you don't need them because you may
2 have them.

3 MR. HUMPHREY: I know there are some of the plans
4 we do not have. Correct, Your Honor; there's probably some
10:18 5 overlap.

6 MR. SHELY: Judge, you might recall that your order
7 to produce certain plans was also tied to we were doing a
8 sampling of original claims; so, we boiled it down into
9 certain claims, and the parties chose claims that they like
10:19 10 and the plans were in connection with that.

11 THE COURT: Now that you have reminded me, I
12 remember it, but I would not have recalled it --

13 MR. SHELY: Then, I apologize, Judge.

14 THE COURT: No. That's all right. But I do that a
10:19 15 lot when you have many things. I even had a case where a
16 bend in a pipeline, the weld, had ruptured.

17 (Off-the-record commentary)

18 THE COURT: All right. To the extent that you all
19 are conversant with the parties and some of these may be
10:20 20 misnomers, if you could just help clear that up.

21 Mr. Cathey, anything else you want to add this
22 morning?

23 MR. CATHEY: Not me personally, Your Honor.

24 THE COURT: How about you?

10:21 25 MR. HUMPHREY: No, Your Honor.

1 THE COURT: Mr. Humphrey?

2 MR. HUMPHREY: No, Your Honor.

3 THE COURT: Palermo, anything you want?

4 MS. PALERMO: No, sir.

10:22 5 THE COURT: Mr. Pidcock?

6 MR. PIDCOCK: No, Your Honor.

7 THE COURT: Does HCA want to say anything at this
8 point?

9 MR. CONSTANTINE: May I approach, Your Honor?

10:22 10 THE COURT: Yes, sir.

11 MR. CONSTANTINE: Good morning, Judge.

12 THE COURT: Good morning.

13 MR. CONSTANTINE: Your Honor, the only thing that I
14 would do is -- I'm not familiar with the prior lawsuits,
10:22 15 obviously, but my impression is that resolution of those
16 prior lawsuits might go a long way if not completely toward
17 resolving this lawsuit, and I would just like to support the
18 idea that this lawsuit should be stayed. It seems like my
19 client is going to be forced to spend an awful lot of money
10:22 20 defending a lawsuit that really would be disposed of were
21 the earlier lawsuits resolved first. So, that just seems to
22 make good sense, and it would save my client an awful lot of
23 money.

24 The other thing that I would add in terms of
10:23 25 my client spending a lot of money -- I don't understand the

1 current -- I mean, they have sued a bunch of ERISA plans.
2 We all understand preemption. Preemption has been around
3 for the 40 years that ERISA has been around. And we're
4 going to end up spending a lot of money arguing about HCA
10:23 5 not being the plan administrator, we're going to spend a lot
6 of money arguing about preemption, and that's just not
7 necessary, Judge, and we shouldn't be forced to incur that
8 kind of an expense.

9 And I would note one other thing, Your Honor.

10:23 10 The plan administrators are identified in Form 5500s. Those
11 are all public record. And what that tells me is that there
12 was almost no --

13 THE COURT: I do a lot of them. They're a public
14 record.

10:23 15 MR. CONSTANTINE: So, that tells me, Judge, that
16 there was no diligence exercised in filing this complaint
17 against my client; and, you know, we're going to pay the
18 price for that, and I don't think that that's appropriate
19 Your Honor.

10:23 20 So, I think the stay makes awfully good sense
21 and would resolve --

22 THE COURT: If you want to find out who the plan
23 administrator is you could sue the plan, as an absolute
24 minimum effort.

10:24 25 MR. CONSTANTINE: Absolutely, Your Honor.

1 THE COURT: Somebody will answer.

2 MR. CONSTANTINE: And, obviously, we -- And Your
3 Honor's very first question, whether they intended to sue
4 both the plan and the plan sponsor was an important
10:24 5 question. You can't tell from the complaint. And when we
6 went to acknowledge, you know, to sign our waivers, there
7 was only one party listed. I actually had to manually
8 through the CM/ECF system -- I had to manually add a second
9 party because I wasn't sure if they had sued one party or
10:24 10 two parties.

11 THE COURT: The way it was constructed and the way
12 it was entered in the computer, it's 24 parties.

13 MR. CONSTANTINE: Correct. And I, out of an excess
14 of caution -- obviously, I didn't want to ignore the
10:24 15 ambiguity in the complaint, Your Honor.

16 So, anyway, that's all I would add, Judge.

17 THE COURT: And that was additional time you had to
18 spend that you shouldn't have had to spend.

19 MR. CONSTANTINE: Of course. And, again,
10:24 20 additional expense that my client had to incur.

21 Thank you, Judge.

22 THE COURT: You're not doing these things pro bono.

23 MR. CONSTANTINE: Your Honor, we actually do handle
24 a fair number of pro bono cases. This is not one of them.

10:25 25 THE COURT: Mr. Constantine, I've found in the

1 practice of law not only did I do pro bono cases, but cases
2 I didn't think were pro bono turned out to be pro bono; and
3 that was one of the most disappointing things in the
4 practice, was perform a miracle and get stiffed.

10:25 5 MR. CONSTANTINE: I understand. I won't admit
6 publicly having done that, Judge, but absolutely....

7 THE COURT: Lawyers need to get paid.

8 And since we're dealing with doctors here, you
9 all are subjected to lots of sneers at cocktail parties and
10:25 10 things about your absence of contribution to the well-being
11 of the world. Without an independent bar there would be no
12 science. It would be the prerogative of the government and
13 the church, which seem to be not only ahistorical
14 institutions but anti-scientific institutions. And you
10:26 15 could remind them, of course, that while your professional
16 forefathers were writing the Constitution theirs were
17 putting leeches on George Washington.

18 I had a doctor tell me at a party that he
19 didn't register to vote because he didn't want to be on jury
10:26 20 duty.

21 And I said, "Well, good."

22 And he was surprised and said, "What do you
23 mean 'good'?"

24 I said, "I don't want a weasel like you voting
10:26 25 or being on a jury. That's awful."

1 That's why I don't get out much.

2 All right.

3 Mr. Cathey.

4 MR. CONSTANTINE: Thank you, Judge.

10:26 5 MR. CATHEY: The only thing I would have to add,
6 Your Honor, was he mentioned the Form 5500s. We have
7 reviewed all of the Form 5500s, and I believe the caption in
8 the complaint, at least, accurately reflects the names that
9 we pulled off the form.

10:27 10 THE COURT: Why did you say you needed discovery to
11 know who the administrators were?

12 MR. CATHEY: Well, to the extent they wanted to
13 dispute that, Your Honor. We thought we --

14 THE COURT: Don't imagine disputes. You have got
10:27 15 enough dispute from what you have said in here.

16 Look. Real litigation is not a game. It's
17 about genuinely disputed facts after a reasonable
18 investigation. They'll tell you in plenty of time if
19 they're disputed. They have to. They've got to speak up or
10:27 20 lose that claim. So, you don't need to worry about it.

21 You don't need to annoy anybody, but what you
22 do need is to make a thorough investigation to start with,
23 which the public disclosures, I have always found, are a
24 good place to start. And now, because we feared young
10:28 25 people were lazy and not very bright, we have invented all

1 these nifty processes where you can get it online without
2 ever leaving the beach.

3 She's smiling because she knows where she does
4 her legal research.

10:28 5 So, that's not a problem. The case has
6 serious problems. That's not one of them. So, you need to
7 focus on the real problem.

8 All right. I will get something done. Thank
9 you.

10

11 COURT REPORTER'S CERTIFICATE

12 I, BRUCE SLAVIN, certify that the foregoing is a
13 correct transcript from the record of proceedings in the
14 above entitled matter, to the best of my ability.

15

16 s/Bruce Slavin
17 BRUCE SLAVIN, RPR, CMR

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